



GPO Billing Code 7405-01

OFFICE OF SPECIAL COUNSEL

5 CFR Part 1800

Revision of Regulations to Allow Federal Contractors, Subcontractors, and Grantees to File Whistleblower Disclosures with the U.S. Office of Special Counsel

AGENCY: U.S. Office of Special Counsel.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Office of Special Counsel (OSC) proposes revising its regulations to accept covered disclosures of wrongdoing from employees working under a contract or grant with the Federal government.

DATES: Written or electronic comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail: lterry@osc.gov. Include “NPRM” in the subject line of the message.
- Fax: (202) 254-3711.
- Mail: Office of General Counsel, 1730 M Street, N.W., Suite 218, Washington, D.C. 20036.
- Hand Delivery / Courier: Office of General Counsel, 1730 M Street, N.W., Suite 218, Washington, D.C. 20036.

FOR FURTHER INFORMATION CONTACT: Lisa V. Terry, General Counsel, U.S. Office of Special Counsel, by telephone at (202) 254-3600, by facsimile at (202) 254-3711, or by email at lterry@osc.gov.

SUPPLEMENTARY INFORMATION: The U.S. Office of Special Counsel (OSC) proposes to revise its regulations to expand who may file a whistleblower disclosure with OSC. This revision will allow employees of Federal contractors, subcontractors, and grantees to disclose wrongdoing within the Federal government if they work at or on behalf of a U.S. government component for which OSC has jurisdiction to accept disclosures.

Congress implemented the Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454, 92 Stat. 1111, and the Whistleblower Protection Act (WPA), Pub. L. 101-12, 103 Stat. 17, codified at 5 U.S.C. 1201, *et seq.*, in order to encourage Federal employees to report government fraud, waste, and abuse and to provide protections for Federal employees who blow the whistle on government wrongdoing. Title 5, Section 1213 of the U.S. Code provides that Federal employees, former employees, or applicants for Federal

employment may disclose to OSC information that they reasonably believe shows a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

Hence, since 1979, Congress has deputized Federal employees, as insiders, to safely disclose wrongdoing they witness or experience in the workplace. The Federal workforce has changed significantly since the passage of the CSRA, notably in the government's increased reliance on contractors. In the modern workforce, employees of contractors, subcontractors, and grantees (collectively "contractors") often work alongside Federal employees, having similar if not identical duties. Thus contractors are similarly situated to observe or experience the same type of wrongdoing as are Federal employees. According contractors a safe channel to report wrongdoing within the government advances Congress's purpose in enacting the CSRA and WPA. Moreover, Congress recently extended protection against retaliation to government contractors who make whistleblower disclosures, thereby signaling its encouragement of such disclosures. OSC deems such protection against retaliation a precondition to asking insiders to risk their careers to report wrongdoing.

The National Defense Authorization Act of 2013 (NDAA), passed by Congress and signed into law by the President, established a "pilot program" to enhance contractor protection from reprisal for a disclosure of information that the contractor reasonably believes is evidence of gross mismanagement of a Federal contract or grant; a gross waste of Federal funds; an abuse of authority relating to a Federal contract or grant; a substantial and specific danger to public health or safety; or a violation of law, rule or regulation related to a Federal contract or grant. *See* Pub. L. 113-1421, 41 U.S.C. 4712.

The NDAA closely tracks the language of the WPA concerning the type of information that may be disclosed and covers disclosures made to, among others, an “authorized official of the Department of Justice or other law enforcement agency.” 41 U.S.C. 4712(a)(2)(E). As a law enforcement agency, and pursuant to its authority under 5 U.S.C. 1213, OSC may receive disclosures from employees of contractors who are covered by the NDAA. The disclosure must concern wrongdoing in the government as described in the NDAA.

Under the proposed rule, OSC may receive disclosures from current and former contractors who allege retaliation for making a protected disclosure under 41 U.S.C. 4712, if they work or worked on behalf of a U.S. government agency in which Federal employees are themselves eligible to file disclosures. The proposed rule will therefore limit OSC’s review of disclosures by Federal contractors to those who are both covered by the NDAA and working at agencies over which OSC already has jurisdiction pursuant to 5 U.S.C. 1213. For example, OSC lacks jurisdiction over employees of the U.S. Postal Service and, therefore, will not have jurisdiction over disclosures made by contractors working for the U.S. Postal Service. See OSC’s website at www.osc.gov for a complete listing of agencies over which OSC does not have jurisdiction.

As with disclosures made by Federal employees pursuant to 5 U.S.C. 1213, any disclosure made by a contractor that involves foreign intelligence or counterintelligence information that is specifically prohibited by law or by Executive Order will be transmitted to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of

the U.S. Senate. 5 U.S.C. 1213(j). The transmission will terminate OSC's involvement with the disclosure.

Once a disclosure is received from an eligible contractor, OSC will evaluate the information and make a determination as to whether there is a "substantial likelihood" that it discloses wrongdoing pursuant to the provisions of section 1213. A contractor working at a Federal facility, alongside Federal employees and under the line supervision of a Federal employee, is virtually in an identical posture to a Federal employee. As such, his/her disclosure will likely carry a comparable degree of reliability as that of a Federal employee. On the other hand, if a contractor's situation differs greatly from that of a Federal employee, it is less likely that OSC will be able to find that the contractor has credible information about government wrongdoing needed to make a substantial likelihood finding. For example, an off-site contractor, or one not working under Federal line supervision, is much less likely to directly encounter government wrongdoing and, therefore, may not have sufficiently reliable information. For that reason, to meet the "substantial likelihood" threshold, he or she may be required to produce compelling documentary information establishing government wrongdoing.

If OSC determines that a disclosure meets the "substantial likelihood" threshold, the Special Counsel will refer the matter to the relevant agency head, who will be required to conduct an investigation into the disclosure. The identity of a contractor who makes a disclosure to OSC will not be revealed without his or her consent, unless the Special Counsel determines that there is an imminent danger to public health or safety, or an imminent violation of criminal law. OSC does not consider anonymous disclosures.

Any disclosure submitted anonymously will be referred to the Office of Inspector General at the appropriate agency.

Contractors who wish to report government wrongdoing to OSC under this rule will be encouraged to use OSC Form 12, which is available at OSC's web site, www.osc.gov. Contractors who wish to report a prohibited personnel practice, including retaliation for whistleblowing, will be required do so through the NDAA's pilot program delineated at 41 U.S.C. 4712. This rule will remain in effect as long as the provisions of the NDAA's "pilot program" are in force.

Procedural Determinations

Administrative Procedure Act (APA): This action is taken under the Special Counsel's authority at 5 U.S.C. 1212(e) to publish regulations in the Federal Register. Interested persons are invited to submit written comments on this proposed amendatory rulemaking. The comments will be carefully considered and any appropriate changes will be made before a final rule is adopted and published in the Federal Register.

Executive Order 12866 (Regulatory Planning and Review): OSC does not anticipate that that this proposed rule will have significant economic impact, raise novel issues, and/or have any other significant impacts. Thus, this proposed rule is not a significant regulatory action under 3(f) of Executive Order 12866 and does not require the Office of Management and Budget to conduct an assessment of potential costs and benefits under 6(a)(3) of the order.

Congressional Review Act (CRA): OSC has determined that this proposed rule is not a major rule under the Congressional Review Act as it is unlikely to result in an annual

effect on the economy of \$100 million or more; or to result in a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies or geographic regions; or to have a significant adverse effect on competition, employment, investment, productivity, or innovation or on the ability of U.S.-based enterprises to compete in domestic and export markets.

Regulatory Flexibility Act (RFA): The Special Counsel certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities because it primarily affects wrongdoing in the Federal government.

Unfunded Mandates Reform Act (UMRA): This proposed revision does not impose any Federal mandates on State, local, or tribal governments, or on the private sector within the meaning of the UMRA.

National Environmental Policy Act (NEPA): This proposed rule will have no physical impact upon the environment and, therefore, will not require any further review under NEPA.

Paperwork Reduction Act (PRA): This proposed rule does not impose any new recordkeeping, reporting, or other information collection requirements on the public.

Executive Order 13132 (Federalism): This proposed revision does not have new Federalism implications under Executive Order 13132.

Executive Order 12988 (Civil Justice Reform): This proposed rule meets applicable standards of 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 5 CFR Part 1800

Administrative practice and procedure, Government employees, Investigations, Law enforcement, Whistleblowing.

For the reasons stated in the preamble, OSC proposes to amend 5 CFR part 1800 as follows:

PART 1800 -- FILING OF COMPLAINTS AND ALLEGATIONS

- 1. The authority citation for 5 CFR part 1800 continues to read as follows:

Authority: 5 U.S.C. 1212(e).

- 2. Section 1800.2 is revised to read as follows:

§1800.2 Filing disclosures of information.

(a) *General.* OSC is authorized by law (at 5 U.S.C. 1213) to provide an independent and secure channel for use by current or former Federal employees and applicants for Federal employment in disclosing information that they reasonably believe shows wrongdoing by a Federal agency. Additionally, OSC may receive disclosures of wrongdoing from current and former Federal contractors, subcontractors, and grantees (collectively, “contractors”) that are cognizable under 41 U.S.C. 4712. Upon receipt of a disclosure, whether from a current or former Federal employee or applicant or from a contractor or former contractor, OSC must determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. If OSC does make a substantial likelihood determination, it shall refer

the information to the agency head involved for investigation and a written report on the findings to the Special Counsel, pursuant to 5 U.S.C. 1213(c). The law does not authorize OSC to investigate the subject of a disclosure.

(b) *Procedures for filing disclosures.* Current or former employees, applicants for Federal employment, and current and former contractors, subcontractors, and grantees whose disclosures are cognizable under 41 U.S.C. 4712 may file a disclosure of the type of information described in paragraph (a) of this section with OSC. Such disclosures must be filed in writing (including electronically – see paragraph (b)(3)(iii) of this section).

(1) Filers are encouraged to use Form OSC-12 (“Disclosure of Information”) to file a disclosure of the type of information described in paragraph (a) of this section with OSC. This form provides more information about OSC jurisdiction, and procedures for processing whistleblower disclosures. Form OSC-12 is available:

- (i) By writing to OSC, at: Office of Special Counsel, Disclosure Unit, 1730 M Street, NW, Suite 218, Washington, DC 20036-4505;
- (ii) By calling OSC, at: (800) 572-2249 (toll-free), or (202) 254-3600 (in the Washington, DC area); or
- (iii) Online, at: <http://www.osc.gov> (to print out and complete on paper, or to complete online).

(2) Filers may use another written format to submit a disclosure to OSC, but the submission should include:

- (i) The name, mailing address, and telephone number(s) of the person(s) making the disclosure(s), and a time when OSC can contact that person about his or her disclosure;

- (ii) The department or agency, location and organizational unit complained of; and
 - (iii) A statement as to whether the filer consents to disclosure of his or her identity by OSC to the agency involved in connection with any OSC referral to that agency.
- (3) A disclosure can be filed in writing with OSC by any of the following methods:
- (i) By mail, to: Office of Special Counsel, Disclosure Unit, 1730 M Street, NW., Suite 218, Washington, DC 20036-4505;
 - (ii) By fax, to: (202) 254-3711; or
 - (iii) Electronically, at: <http://www.osc.gov>.

Dated: January 14, 2015.

Mark P. Cohen,
Principal Deputy Special Counsel.

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